APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5351

UNITED STATES OF AMERICA, APPELLEE

v.

LEARLEY REED GOODWIN, APPELLANT

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Herbert F. Murray, District Judge

Argued November 14, 1980 Decided January 9, 1981

Before WINTER, BUTZNER, and WIDENER,
Circuit Judges

WINTER, Circuit Judge:

Convicted of forcible assault of a federal officer in violation of 18 U.S.C. § 111 and fleeing and eluding a police officer in violation of 18 U.S.C. §§ 7 and 13 and Md. Code Ann., Transp. Art., § 21-904, Learley Reed Goodwin appeals. We hold that his conviction of violating § 111 must be reversed, because, under the circumstances of this case, he was denied due process of law when he was indicted and tried for

that offense only after he exercised his right to a jury trial on the petty offense and misdemeanor charges originally lodged against him for the same conduct. We see no infirmity, however, in his other conviction, and we affirm the judgment entered thereon.

I.

Early in the evening of February 2, 1976, defendant was stopped for speeding on the Baltimore-Washington Parkway by a United States Park policeman. After defendant stopped, he emerged from his car to talk to the policeman. The policeman returned with him to the passenger side of defendant's car, and, after obtaining information from defendant's license and registration, the officer directed his flashlight into defendant's car. The officer saw a clear plastic bag underneath the armrest next to the driver's seat. He then asked defendant to get into the car and to raise the armrest. Defendant did so, but, as he uncovered the bag, he grabbed it, threw it onto the floor, placed the car into gear and rapidly accelerated. As the car started forward, it "fishtailed", striking the officer and knocking him onto the back of the car and then onto the highway. When the officer recovered himself, he returned to his car and, with lights flashing and siren sounding, pursued defendant at a speed reaching ninety-five miles per hour. Nevertheless, defendant eluded the officer in heavy traffic in the District of Columbia.

The next day the officer filed a complaint in the district court charging defendant with various petty offenses and misdemeanors, including assault. A United States Magistrate issued a warrant for defendant's arrest, and on March 11, 1976, defendant was arrested. On March 30, 1976, he was brought

before a magistrate. At that hearing defendant sought to have the charges against him dismissed by testifying that he was in Atlanta, Georgia when the incident on the parkway occurred. The magistrate, however, found probable cause, released defendant on personal recognizance, and set a trial date of April 29, 1976.

Defendant did not appear for trial on that date. Later he was found in custody in another jurisdiction on other charges. He was returned to Maryland on May 24, 1979, for trial. At that time the government was represented by a trial attorney from the Department of Justice who was on special detail for two weeks to try petty offenses and misdemeanors before the magistrate. The attorney was familiar with the court papers as well as the officer's incident report, and she had conducted plea negotiations with defendant's lawyer. These negotiations had come to naught because defendant declined to plead and instead elected a jury trial. During the discussions, the prosecutor did not mention the possibility that the United States would seek to have defendant indicted for the felony of forcible assault on a federal officer (18 U.S.C. § 111).

As a result of defendant's election to be tried by a jury, his case was transferred to the district court for trial. The United States Attorney then sought and obtained the indictment charging defendant with a violation of 18 U.S.C. § 111. By affidavit the United States Attorney spelled out his reasons for this action: (1) defendant's conduct on February 2, 1976 was considered to be a serious violation of law, (2) defendant had a lengthy history of violent crime, (3) defendant's conduct on February 2, 1976 was considered to be related to major narcotics transac-

tions, (4) defendant was believed to have committed perjury when he testified at his preliminary hearing that he was in Atlanta, Georgia at the time of the incident on the Baltimore-Washington Parkway, and (5) defendant had failed to appear for trial on April 29, 1976.

Defendant was convicted on the felony charge under 18 U.S.C. § 111 as well as the misdemeanor charge of fleeing or eluding a police officer in violation of Maryland law. His motion to set aside the verdict with respect to § 111 on the ground of prosecutorial vindictiveness was denied on the merits, the district court ruling that there was good cause why the motion was not filed pre-trial as ordinarily required by Rule 12, F.R. Crim. P.

II.

On this record we readily conclude that the prosecutor did not act with actual vindictiveness in seeking a felony indictment. We must nevertheless decide if the felony prosecution was improper where, as is obvious here, it was not instituted until after defendant elected to be tried by a jury on lesser charges arising from the same conduct, even though the facts which motivated the prosecutor to seek the indictment were available to the government before plea bargaining was conducted and before defendant elected to exercise his right to a jury trial.

The answer to the issue which confronts us is found in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969); *Blackledge* v. *Perry*, 417 U.S. 21 (1974); and *United States* v. *Johnson*, 537 F.2d 1170 (4 Cir. 1976), where we construed and applied *Pearce* and *Blackledge*. Briefly stated, *Pearce* held that the due process clause protects a defendant from both actual

vindictiveness and the fear of retaliation for exercising his right to appeal. Thus, *Pearce* held that a defendant convicted on retrial after having successfully attacked his first conviction could not be subjected to a more severe sentence except upon "objective information concerning identifiable conduct" occurring after the time of the original sentence. 395 U.S. at 726. *Blackledge* applied this principle to the prosecutor in a case where a defendant requested a de novo trial in a court of record following a misdemeanor conviction in a magistrate's court. It held that the prosecutor could not constitutionally respond to a defendant's invoking his statutory right of appeal by bringing a more serious charge against him prior to the trial de novo, at least where the basis for the more serious charge did not arise after the original conviction. In *Blackledge*, the court specifically noted that there was no evidence of actual prosecutorial vindictiveness. Nevertheless, the court found a violation of due process since the circumstances of the case presented "a realistic likelihood of 'vindictiveness.'" 417 U.S. at 27. In *Johnson* we held that the due process guarantee against actual and potential prosecutorial vindictiveness prohibited the government from bringing more serious charges against a defendant who was successful in upsetting his guilty pleas to some of the charges for which he was originally indicted, notwithstanding that the record did not establish that the prosecutor maliciously sought the second indictment. We stressed that the rationale of *Pearce* and *Blackledge* was that, since the *fear* of prosecutorial vindictiveness, as well as *actual* vindictiveness, had a chilling effect on a defendant's right to appeal, to attack his conviction collaterally, or to be tried de novo, the due process clause required that a defendant be freed of the ap-

prehension of such a retaliatory motivation as well as actual retaliation.

Applied to this case, this well-established principle manifestly requires that defendant's felony conviction be set aside. Defendant had a constitutional right to a jury trial on the misdemeanor and petty offense charges. The due process clause would not permit retaliation for the exercise of the right. Under *Blackledge*, we need not determine whether retaliation actually occurred in the case. It is enough that the circumstances surrounding the felony indictment give rise to a genuine risk of retaliation. Lest exercise of the right to a jury trial be chilled, the due process clause requires that defendant be freed of the apprehension of retaliation by prohibiting the bringing of more serious charges, once the right was exercised, at least where there is no showing that the charges could not have been brought before defendant made his election for a jury trial.

We turn to the government's arguments as to why we should reach a different conclusion. First, the government contends that the more recent Supreme Court decision in *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), undercuts defendant's reliance on the apprehension of vindictiveness as a basis for finding a due process violation. In *Bordenkircher*, the Court held that a prosecutor does not violate due process by threatening to increase charges in the course of plea bargaining and then following up on that threat after plea negotiations break down. *Bordenkircher* is easily distinguishable from *Blackledge* and from the present case. In *Bordenkircher* the prosecutor's intent to press for more serious charges was made known at the outset of negotiations, and the Court explicitly limited its holding to that factual situation:

> This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty. As a practical matter, in short, this case would be no different if the grand jury had indicted Hayes [on the more serious charge] from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain.

434 U.S. at 360-61. Specifically distinguishing *Blackledge*, the Court noted:

> In [*Blackledge*] the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction—a situation 'very different from the give-and-take negotiation common in plea bargaining. . . .'

Id. at 362 (citations omitted).

The government relies on one passage from *Bordenkircher* which purportedly limits the rationale of *Blackledge:*

> The Court has emphasized that the due process violation in cases such as [*Blackledge*] lay not in the possibility that a defendant might be deterred from the exercise of a legal right, see *Colten* v. *Kentucky*, 407 US 104, 32 L Ed 2d 584, 92 SCt 1953; *Chaffin* v. *Stynchcombe*, 412 US 17, 36 L Ed 2d 714, 93 S Ct 1977, but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction. See *Blackledge* v. *Perry, supra*, at 26-28, 36 L Ed 2d 714, 92 S Ct 1977.

434 U.S. at 363. From this, the government argues in its brief that the Court shows "its fundamental concern was actual, rather than the defendant's perceived, prosecutorial retaliation." We think, however, that the government has missed the point. *Colten* and *Chaffin*, cited by the Supreme Court in the quoted passage, found the rationale of *Blackledge* inapplicable where, upon retrial, a defendant was subjected to more than his initial punishment by a jury wholly unaware of the punishment following the initial conviction or by a judge different than the one who imposed the original sentence. In those cases, even though the possibility of increased punishment might have deterred a defendant in exercising his right to appeal, the deterrent did not rest on the possibility of retaliation since the judge or jury in the second trial had no reason to be vindictive. In citing *Colten* and *Chaffin*, therefore, the Supreme Court suggests only that a deterrent arising solely from the risk of higher punishment may be permissible while a deterrent arising from the risk of vindictiveness is not.

Unlike the defendants in *Colten* and *Chaffin*, but like the defendant in *Blackledge*, Goodwin faced increased charges brought by a prosecutor who had an incentive to deter misdemeanor defendants from exercising a right that would "require increased expenditures of" his own time. *Blackledge*, *supra*. 417 U.S. at 27. Thus, for defendant and those similarly situated, "the danger that the [government] might be retaliating" is real. *Bordenkircher*, *supra*, 434 U.S. at 363.

Next the government argues that we should reconsider *Johnson*. It stresses that the Fifth and Sixth Circuits have adopted a balancing test in cases which involve prosecution on increased charges after a de-

fendant's exercise of procedural rights, weighing the extent to which the allowance of increased charges will chill a defendant's exercise of his rights against the extent to which disallowance will limit the exercise of the prosecutor's discretion. *See United States* v. *Andrews*, —— F.2d —— (6 Cir. Sept. 30, 1980); *Jackson* v. *Walker*, 585 F.2d 139, 145 (5th Cir. 1978); *Hardwick* v. *Doolittle*, 558 F.2d 292 (5 Cir. 1977), *cert. denied*, 434 U.S. 1049 (1978).[1] In short, the government takes strong exception to our holding in *Johnson* that circumstances giving rise to a genuine risk of vindictiveness create a *per se* violation of the due process clause, absent proof by objective evidence that the increased charges could not have been brought in the first instance.

To this argument, there are several answers. First, it is inappropriate for us to overrule the decision of another panel of this court. Such a step is reserved for the court sitting in banc. More importantly, we are persuaded that our initial reading of *Blackledge* was correct and should not be altered. *Blackledge* suggests no balancing test. It adopts a prophylactic rule designed to spare courts the unseemly task of probing the actual motives of the prosecutor in cases where objective circumstances suggest a realistic possibility of vindictiveness.

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[1] These cases hold that, once a defendant establishes a risk of vindictiveness, the burden shifts to the government to prove a legitimate reason for the increased charges. To the extent that these cases permit the government to rebut defendant's prima facie showing through objective proof that the increased charges could not have been brought in the first instance, they do not depart from our holding here. To the extent that they permit a more far-reaching inquiry into the actual motivation of prosecutors, we are not persuaded that they comport with the prophylactic rule set forth in *Blackledge*.

If the government wishes to avoid the limitation on prosecutorial discretion dictated by *Blackledge*, it must come forward with objective evidence to show that the increased charges could not have been brought before the defendant exercised his rights. This it has not done in the instant case. Although the information which led the United States Attorney to seek a felony indictment may not have been in his possession until defendant exercised his right to a jury trial and the case was transferred from the magistrate to the district court, the information was available to the government, if not from the outset, at least prior to Goodwin's election of a jury trial.[2] Nevertheless, the conclusion is inescapable that, "but for" his election of a jury trial, defendant would have been tried before the magistrate solely on the lesser charges.

Thus we hold that the due process clause prohibits defendant's conviction on the felony charge and that conviction must be reversed. Because of this conclusion, we have no occasion to consider defendant's contention that the evidence was legally insufficient to convict him of the felony charge.

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[2] Even at the magistrate level, the government was not unrepresented. We reject the argument that the lawyer from the Department of Justice on temporary assignment was not generally an "attorney for the government" within the meaning of F. R. Crim. P. 54(c) since she appeared with the apparent consent of the United States Attorney. We also reject the government's invitation to explore the internal functioning of the federal prosecutorial system in order to determine how, when, and why particular bits of information came to the attention of particular officials. This is precisely the sort of inquiry that the prophylactic approach of *Blackledge* seeks to avoid.

III.

Defendant argues for reversal of his conviction under the Maryland fleeing and eluding statute on two grounds. First he contends that Count III of the indictment failed to allege all the elements of an offense under Maryland law because it did not state that the police officer was in uniform, prominently displaying his badge or other insignia of office. Next he contends that, even if he was properly charged under the terms of the statute, the Maryland statute has been preempted by federal law. Neither contention persuades us.

A. The Requirements of the Maryland Statute.

The Maryland statute which defendant was convicted of violating prohibits the driver of a vehicle from attempting to elude a police officer by failing to stop, by fleeing on foot or by any other means. The statute applies:

> [W]hen a police officer gives a signal to stop, whether by hand, voice, emergency light, or siren, if:
>
> > (1) The police officer is in uniform, prominently displaying his badge or other insignia of office; *and*
> > (2) The police officer, when in a vehicle, is in a vehicle appropriately marked as an official police vehicle. (emphasis added)

Ann. Code of Md., Transp. Art., § 21-904.

While the indictment charged that defendant attempted to elude a police officer who had given him a visual and audible signal to stop and who was in a vehicle appropriately marked as an official police

vehicle, it did not allege that the officer was in uniform, prominently displaying his badge or other insignia of office. Defendant contends that because the two conditions set forth in the statute are stated in the conjunctive, both must be alleged and proved, and therefore the count of the indictment alleging the Maryland crime is fatally defective because only one of the conditions is alleged.

There can be no doubt that the conditions of the statute are phrased in the conjunctive, but they can be read in the disjunctive if that is the evident legislative intent. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979); *George Hyman Construction Co.* v. *OSHA*, 582 F.2d 834, 840 n.10 (4 Cir. 1978). We think that the common-sense meaning of the statute is that it applies if the officer is in uniform and is prominently displaying his badge, but that the statute applies also if the police officer, however garbed, is in an officially marked car. The purpose of the statute is to effect compliance with an officer's signal to stop. Not unreasonably, notice of the authority of the officer to give the signal is an essential element of the crime of failing to obey. That notice is given when the officer is on foot and is wearing his uniform and insignia of office, *or*, if the officer is in a vehicle, when the vehicle is marked as an official police vehicle. In the latter instance, additional notice from the wearing of a uniform and displaying an insignia of office is unnecessary, especially when it is remembered that the garb of the policeman within the official police vehicle may not even be visible.

A contrary reading would lead to some bizarre results. If both conditions must be alleged and proved in order to render § 21-904 applicable, a motorist with impunity could ignore a signal to stop from a

plainclothes policeman in an official police car or an off-duty policeman in an official car. We do not think that these possibilities were intended by the Maryland legislature.

B. Preemption of the Maryland Statute.

The principles of preemption to preclude the bringing of charges under the Assimilative Crimes Act, 18 U.S.C. § 13, have recently been canvassed by us in *United States* v. *Eades*, 615 F.2d 617 (4 Cir. 1980) and —— F.2d —— (4 Cir. 1980) (in banc), and need not be repeated here. Defendant claims preemption by 36 C.F.R. § 50.29(b) which provides:

> All traffic regulations applicable in areas covered by this part shall be observed by the operators of vehicles, equestrians, and by pedestrians who shall also comply with official traffic signs and signals, and traffic direction by voice, hand or whistle, from any member of the United States Park Police, Metropolitan Police, Park Rangers or special policemen, properly equipped with police badge on duty in an area covered by this part. These directions may include signals for slowing down, stopping, backing, approaching or departing from any place, the manner of taking up or setting down passengers, and the loading and unloading of any material.

Although defendant concedes that the regulation does not track the language of § 21-904, he argues that the regulation governs the same generic acts as the statute proscribes, particularly since a signal to stop given by a police officer is an element of the statutory crime.

We are not persuaded. As its text demonstrates, the thrust of the statute is to render criminal eluding a police officer under the circumstances therein defined. The thrust of the regulation is traffic and pedestrian control by an officer on foot. The objectives of the statute and of the regulation are quite different. Indeed we do not think that defendant could have been found guilty of violating the regulation. It makes criminal disobedience of "voice, hand or whistle" directions; defendant was convicted of eluding the emergency light and siren signals given by the police officer. We see no preemption.

AFFIRMED IN PART;
REVERSED IN PART.

WIDENER, Circuit Judge, concurring and dissenting:

While I concur in th result obtained by the majority in affirming the conviction of the misdemeanor of fleeing and eluding a police officer, I respectfully dissent to overturning the conviction of the felony of assaulting an officer in violation of 18 U.S.C. § 111.

As the majority correctly notes, *Bordenkircher* "held that a prosecutor does not violate due process by threatening to increase charges in the course of plea bargaining and then following up on that threat after plea negotiations break down." [See 6a, *supra*]. Applying *Bordenkircher* to our case, if the government had threatened to prosecute Goodwin for assaulting the officer during the plea negotiations which did take place, and then had indicted Goodwin for that crime when the plea negotiations broke

down, such conduct would have been approved under *Bordenkircher*. But because of the lack of a threat by the prosecutor to indict, the majority sets aside the conviction because "the circumstances surrounding the felony indictment [the assault on the officer] give rise to a general risk of retaliation." [See 6a, *supra*]. The court now holds that while an expressed threat of retaliation will not suffice to set aside a conviction because of *Bordenkircher*, merely a general risk of retaliation without the expressed threat will suffice. If we analyze what the prosecutor did in *Bordenkircher*, we see that in that case he deliberately threatened the defendant with indictment for an additional offense in order to discourage trial, and to encourage a guilty plea, and the prosecutor expressly so advised the defendant before trial. *Bordenkircher* at 358, n. 1. In our case, there is no intimation that the prosecutor was acting with vindictiveness in seeking the indictment for assaulting the officer, and the majority so finds. [See 4a, *supra*]. Neither did he make any attempt to discourage any exercise of Goodwin's right to trial by jury. Thus, what the majority now adopts is a *per se* rule, the effect of which is that a prosecuting attorney must see to it that formal charges are *initially* filed for the most serious offense of which a defendant may be guilty or else forever forfeit the right to so prosecute him if the defendant contests the prosecution in any way.

I doubt that we should follow our *Johnson* case so far and that it is any authority for the proposition relied upon following the decision in *Bordenkircher*. An en banc court is not needed, of course, to accept a superseding opinion of the Supreme Court, and, as we had to, we have so held in *Marzullo* v. *Maryland*, 561 F2d 540 (1977).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

January 9, 1981

To: Paul W. Spence, Esq.

Edward M. Norton, Jr., Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 79-5351 this date.

The Court's opinion is enclosed.

WILLIAM K. SLATE, II
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5351

UNITED STATES OF AMERICA, APPELLEE

versus

LEARLEY REED GOODWIN, APPELLANT

ORDER

The appellee's petition for rehearing and suggestion for rehearing in banc have been submitted to the court. A poll was requested on the suggestion for rehearing in banc, but it lost for lack of a majority of votes by the judges eligible to vote. Judge Widener voted to grant rehearing.

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Winter with the concurrence of Judge Butzner. Judge Widener dissents from the denial of rehearing.

Filed April 16, 1981

For the Court,

/s/ William K. Slate, II
Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Criminal No. HM-79-1298

UNITED STATES OF AMERICA

v.

LEARLEY REED GOODWIN

ORAL OPINION OF THE DISTRICT COURT DATED NOVEMBER 7, 1979

* * * * *

THE COURT: I would like to decide this motion now, having heard the arguments of counsel, and I am going to read a brief bench opinion in connection with it.

The Defendant Learly Reed Goodwin was convicted by a jury in this Court on September 12, 1979 on Count One of a three-count indictment. Count One charged the Defendant with wilfully and forceably assaulting, resisting, opposing, impeding, intimidating and interfering with an officer of the United States Park Police while the officer was engaged in the performance of his official duties, and with using a deadly and dangerous weapon, an automobile, in the commission of the offense.

The incident which gives rise to the charges occurred on February 2, 1976 on the Baltimore-Washington Parkway. The officer involved, Officer Morrissette, filed an appropriate complaint against the Defendant on February 3, 1976. The charges in that complaint were misdemeanors or perhaps some petty offense charges. In March of 1976 a trial of the issues before Magistrate Burgess was set for April

29, 1976. Because the Defendant did not appear for trial and was out of the jurisdiction, there were no further proceedings before Magistrate Burgess until May 24, 1979, when the Defendant refused to consent to be tried before the Magistrate and requested a jury trial. On July 3, 1979, the Grand Jury returned the three-count indictment already referred to.

The Defendant now moves that Count One of the indictment be dismissed, alleging that the prosecution's decision to seek a felony indictment after the Defendant refused to waive his right to a jury trial creates an "appearance of vindictiveness" that violates his due process right to seek a jury trial without fear of retaliation by the prosecution. For the reasons to be set out in this opinion, the Court has reached the conclusion that the motion must be denied.

The Government points out that the motion is not timely filed in accordance with Rule 12(b) of the Federal Rules of Criminal Procedure. Although the Government at argument today has indicated a preference to have the Court proceed and to decide the case on the merits of the issues presented, the Defense has submitted its arguments orally today on the Rule 12(b) point and the Court will deal briefly with it.

Rule 12(b) provides in part:

"(b) Pre-trial Motions. Any defense, objection or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

"(1) Defenses and objections based on defects in the institution of the prosecution."

Rule 12(f) provides in part that "Failure by a party to raise defenses or objections or to make requests which must be made prior to trial shall constitute waiver thereof . . ." Because the Defendant's motion falls within Rule 12(b)(1), and was not filed prior to trial, the Defendant technically waived his rights to raise the issue. However, Rule 12(f) further provides that a court may grant relief from waiver "for cause shown."

The Fourth Circuit has held that ". . . relief from . . . waiver is an exercise of extraordinary power and must be regarded as an exception to the rule." *United States* v. *Almo*, 544 F.2d 1215 at 1217 and 18 (4th Cir. 1976). This circuit's two-pronged test requires that the movant show both actual prejudice stemming from the right denied him and "cause" as prescribed in the rule. In the Court's view, Mr. Goodwin has met the two requirements. He will suffer actual prejudice if not allowed to challenge the propriety of Count One. It has been held that "cause" includes the danger that a criminal defendant will be penalized for the inadvertence of his attorney, *United States* v. *Hall*, 565 F.2d 917 (5th Cir. 1978), and the Defendant's attorney in this case has admitted that the only reason for the delay in filing the motion was his own inadvertence. The Court will grant relief from the waiver and decide the motion on its merits.

The basis of Defendant's motion is a doctrine, developed under the due process clause, which seeks to protect the ability of a criminal defendant to pursue his or her constitutional, statutory or common-law procedural rights without fear of retaliation by a sentencing judge or a prosecutor. The goal is to eliminate even the appearance of vindictiveness that results when a defendant successfully challenges an original charge, and the judge imposes a stiffer sentence upon the defendant's second conviction, or the

prosecutor increases the charges in an indictment or information. The leading cases are *North Carolina* v. *Pearce*, 395 U.S. 711 (1969) and *Blackledge* v. *Perry*, 417 U.S. 21 (1974).

As Mr. Spence has argued, it is the appearance of vindictiveness that is crucial, not any actual retaliatory intent. *Blackledge* v. *Perry*, 417 U.S. at 28; *U.S.* v. *Ruesga-Martinez*, 534 F.2d 1367 at 1369 (9th Cir. 1976).

It is clear that the doctrine applies to a defendant who refuses to be tried by a magistrate and requests a jury trial instead. See in that connection *U.S.* v. *Ruesga-Martinez*, already cited.

The first question is whether an appearance of vindictiveness exists. In the majority of cases dealing with the issue, the entity that filed the original charges against the defendant was the same entity that later increased the charges. *See*, for example, *U.S.* v. *Jameson*, 505 F.2d 407 (D.C. Cir. 1974); *U.S.* v. *Andrews*, 444 F. Supp. at 1238 (E.D. Mich. 1978). In the present case, Officer Morrissette filed the original complaint, while the Assistant United States Attorney, Mr. Norton, sought the later indictment. Nevertheless, the Court finds there is an "appearance of vindictiveness" here as that term is used in the cases.

The Supreme Court stated in *Blackledge* v. *Perry* at Pages 27 and 28 of 417 U.S.:

"A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealling and thus obtaining a trial *de novo* in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may

even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals—by 'upping the ante' through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy—the State can insure that only the most hardy defendands will brave the hazards of a *de novo* trial."

That language applies equally well to the circumstances here, and raises the issue of retaliation.

The next question, therefore, is whether the prosecution has adequately dispelled any appearance of vindictiveness. The case law establishes that a prosecutor may be justified in increasing the charges against a defendant if he or she can show that not all the essential elements of the greater offense existed when the original complaint was brought; or if he or she can show the discovery of new evidence of which the Government was unaware, through no fault of its own, at the time of the original charge. *U.S.* v. *Jamison*, 505 F.2d at 415. *See also U.S.* v. *Andrews*, 444 F. Supp. 1238 at 1241 and *Blackledge* v. *Perry*, 417 U.S. at 28 and 29.

Although the question is a close one, the Court finds that the prosecutor in this case has adequately dispelled any appearance of retaliatory intent. In his affidavit attached to the Government's opposition to the motion, the Assistant United States Attorney stated that he did not receive all the information relating to the charges against Mr. Goodwin until June 11, 1979, and that he did not read the information and decide to seek an indictment until some time thereafter. Unlike the prosecutor in *U.S.* v. *Alvarado-Sandoval*, 557 F.2d 645 (9th Cir. 1977), in which a motion to dismiss the indictment was granted, the Assistant U.S. Attorney in this case did not know of the Defendant's prior record until after the Defendant

requested a jury trial. Since the prosecutor was not aware of the additional information on which the indictment was based until after the May 24th proceedings before Magistrate Burgess, it appears far less likely that he was motivated by any vindictiveness.

The Defendant intimates that because the Government had *access* to all the pertinent information prior to May 24, 1979, since a representative of the Antitrust Division of the Department of Justice was appointed for a two-week tour of duty before Magistrate Burgess in the prosecution of misdemeanors and petty offense type cases that the impermissible appearance of vindictiveness remains. However, the case law does not imply, and the due process clause does not require, that the prosecutor carry such a heavy burden of acquiring all information which is potentially available to him at a given time.

For all the foregoing reasons, the Defendant's motion to dismiss Count One of the indictment must be denied, and I will ask Mr. Norton to submit an appropriate order to that effect.

Thank you, gentlemen.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. HM-79-0298

UNITED STATES OF AMERICA

v.

LEARLEY REED GOODWIN

ORDER

Defendant Learley Reed Goodwin's Motion to Dismiss Count One of the Indictment is hereby denied for the reasons stated at the hearing held on November 7, 1979.

/s/ Herbert F. Murray
HERBERT F. MURRAY
United States District Judge

Filed November 14, 1979

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. HM-79-0298

UNITED STATES OF AMERICA

v.

LEARLEY REED GOODWIN

AFFIDAVIT

CITY OF BALTIMORE)
STATE OF MARYLAND)

I, Edward M. Norton, Jr., Assistant United States Attorney for the District of Maryland, being duly sworn, deposes and states:

In late March 1979, I was asked by Assistant United States Attorney Robert Trout to call Ms. Pat Hand, secretary to Magistrate George Burgess of the United States District Court for the District of Maryland, to answer a question she had concerning the transfer of a prisoner from Virginia to the District of Maryland for trial. I called Ms. Hand, and she informed me that an individual named Learley Reed Goodwin, for whom a complaint for failure to appear for trial and a bench warrant had been outstanding in the District of Maryland since March 1976, had been located in jail in Arlington, Virginia

where he was awaiting sentencing. Ms. Hand further explained to me that she was experiencing difficulty in having Goodwin brought to the District of Maryland for trial. The authorities in Virginia would not release Mr. Goodwin to the United States Marshals because he had come to Virginia from the State of California where he had been in prison, and Virginia was obligated to return him to California under the Interstate Agreement on Detainers.

I told Ms. Hand that I would contact the appropriate officials in Virginia and California to work out a procedure for having Mr. Goodwin brought to the District of Maryland before he was returned to California. I did not discuss with Ms. Hand at that time any outstanding charges against Goodwin in the District of Maryland other than the complaint and warrant for failure to appear for trial.

I subsequently contacted Thomas Rawles Jones, Jr., Assistant Commonwealth's Attorney in Alexandria, Virginia and Irving Marks, Detainer Compact Administrator for the State of California. We agreed that the Sheriff of Alexandria, Virginia would release Goodwin to the custody of the United States Marshal for the District of Maryland upon presentation of a Writ of Habeas Corpus. After proceedings against Mr. Goodwin were concluded in the United States District Court for the District of Maryland, the United States Marshals would return Mr. Goodwin to the California Correctional Training Facility at Soledad, California. That agreement was confirmed in a letter dated May 7, 1979 from Assistant Commonwealth Attorney Jones to me. I communicated that agreement to Magistrate Burgess' secretary on May 16, 1979.

My discussions in April with Assistant Commonwealth's Attorney Jones dealt almost entirely with the procedure for returning Goodwin to Maryland. However, during those discussions, I believe I asked Mr. Jones about Goodwin's status in Virginia, and he told me Goodwin was awaiting sentencing after having been convicted of attempting to shoot a police officer and possession of heroin.

On June 11, 1979 I received a memorandum from Paul R. Schlitz, Clerk of the United States District Court, to which were attached the documents filed with Magistrate Burgess.

Subsequent to June 11, 1979, I reviewed those documents including the incident report dated February 2, 1976 and the Complaint filed on February 3, by Officer James M. Morrissette, United States Park Police, charging Mr. Goodwin with operating a vehicle in excess of the posted speed limit (2 counts), assault by striking, beating or wounding, failing to give aid, information, and identification at the scene of a personal injury accident and fleeing and eluding a police officer, all of which took place on the Baltimore Washington Parkway near Maryland Route 450 on February 2, 1976. I then contacted Officer Morrissette on the telephone and discussed the case with him. He confirmed the details set forth in his incident report dated February 2, 1976 and he provided me with additional information about Goodwin.

Officer Morrissette told me that several weeks after the incident on the Baltimore Washington Parkway on February 2, 1976, as charged in the complaint, Goodwin had appeared at a preliminary hearing before Magistrate Burgess and had testified that on February 2, 1976 he was in Atlanta, Georgia. According to Officer Morrissette, Goodwin testified that

he flew from Washington, D. C. to Atlanta the end of January 1976, leaving his car at National Airport with his keys and wallet under the front seat.

Officer Morrissette stated to me that he was certain that Goodwin's explanation at the preliminary hearing was untruthful and that Goodwin was the man whom he had stopped for speeding on the Baltimore Washington Parkway on February 2, 1976. Officer Morrissette related that when he first stopped Goodwin, Goodwin had given him a District of Columbia driver's license with his photograph on it, and he had not returned it to Goodwin before Goodwin fled the scene. Officer Morrissette told me that the man he stopped on the Baltimore Washington Parkway on February 2, 1976, the man whose photograph appeared on the District of Columbia driver's license he obtained at the scene, and the man who testified at the preliminary hearing were the same person, Learley Reed Goodwin. Therefore, Officer Morrissette concluded, Goodwin could not have been in Atlanta at the time of the incident on the Baltimore Washington Parkway on February 2, 1976.

During my initial conversation with Officer Morrissette, he also told me that subsequent to his arrest of Goodwin on February 2, 1976, he learned that Goodwin was known to Drug Enforcement Administration authorities and the Washington, D. C. police to be a major heroin dealer. Officer Morrissette related that Goodwin was associated with two individuals who smuggled heroin from Mexico and who were known to have flown heroin into airfields in Florida, Georgia and Maryland. More detailed information concerning Goodwin's drug activities could be obtained, according to Officer Morrissette, from the District of Columbia Narcotics Squad, and he

gave me the name of the officer in charge of the investigation of Goodwin. I did not contact that individual prior to seeking an indictment. However, after indictment and before trial, I did contact that individual who confirmed the information given to me by Officer Morrissette in June 1979.

Officer Morrissette also told me during the initial interview that he had attended Goodwin's trial in Alexandria, Virginia in February 1979. He stated that the charges in that case involved heroin dealings by Goodwin in 1976 shortly before the incident on the Baltimore Washington Parkway on February 2, 1976 and that Goodwin had failed to appear for trial in Virginia at the same time he failed to appear for trial in the United States District Court for the District of Maryland.

After my initial interview with Officer Morrissette, and before seeking an indictment, I again contacted Assistant Commonwealth Attorney Thomas Rawles Jones in Alexandria, Virginia. He told me that Mr. Goodwin had been sentenced to 18 years; 15 for possession of heroin with intent to distribute and 3 years for the attempted unlawful shooting of a police officer. He told me that Goodwin had appealed his conviction. Mr. Jones then gave me a detailed exposition of the evidence against Mr. Goodwin in the Virginia case including his arrest in December 1975 with over five hundred $20 bags of heroin in his possession and an ensuing violent struggle with the arresting police officers. Mr. Jones also related that he believed Mr. Goodwin's failure to appear for trial in the Circuit Court for Alexandria City on April 8, 1976 had been carefully staged with his attorney's assistance. According to Mr. Jones, one of Mr. Goodwin's partners in the distribution of heroin was his attorney George

Gates who was subsequently convicted of violations of the federal narcotics laws. I was aware that Mr. George Gates was the attorney who also represented Goodwin at the preliminary hearing before Magistrate Burgess on March 30, 1976 at which time Goodwin testified he was in Atlanta, Georgia on February 2, 1976, the date of the incident on the Baltimore Washington Parkway.

After my review of the court records, my initial interview with Officer Morrissette, and my discussions with Assistant Commonwealth's Attorney Jones, I decided to seek an indictment from the grand jury charging Goodwin with assaulting, resisting, or impeding a federal officer with a deadly weapon in violation of 18 U.S.C. § 111, assault with a dangerous weapon within the special territorial jurisdiction of the United States in violation of 18 U.S.C. § 113[(c)], fleeing and eluding a police officer in violation of 18 U.S.C. §§ 7 and 13 and the Transportation Article § 21-904, Ann. Code of Md., and failure to appear in violation of 18 U.S.C. § 3150. My reasons for seeking an indictment follow.

First, I considered Mr. Goodwin's conduct on February 2, 1976 to be a serious violation of law. He had intentionally resisted a United States Park police officer in the performance of his duties, striking the officer with an automobile, leaving him perhaps seriously injured on the highway, and fleeing through traffic at a high rate of speed, thus endangering the lives of other drivers.

Second, among the documents I received in the Court file from Magistrate Burgess was a copy of Goodwin's F.B.I. record. That record showed Mr. Goodwin's lengthy history of violent crime.

Third, based on my conversations with Officer Morrissette and Assistant Commonwealth's Attorney Jones, I judged Goodwin's conduct on February 2, 1976 to be related to major narcotics transactions.

Fourth, I believed Mr. Goodwin had committed perjury in his testimony under oath at the preliminary hearing before Magistrate Burgess on March 30, 1976.

Fifth, subsequent to the filing on the initial complaint on February 3, 1976, Mr. Goodwin had failed to appear for a trial scheduled for April 29, 1976.

In summary, my decision to seek an indictment charging Mr. Goodwin with two felonies, 18 U.S.C. § 111 and 18 U.S.C. § 113[(c)] was based upon the totality of the circumstances set forth above and upon my judgment that his conduct on February 2, 1976 involved not merely a traffic incident on the Baltimore-Washington Parkway but also serious violations of federal law committed by a dangerous individual. My decision to seek a grand jury indictment was not motivated in any way by, nor did I ever consider Goodwin's request for a trial by jury in the United States District Court.

/s/ Edward M. Norton, Jr.
EDWARD M. NORTON, JR.
Assistant United States Attorney

STATE OF MARYLAND)
) ss:
CITY OF BALTIMORE)

I HEREBY CERTIFY that on this 23rd day of October, 1979, EDWARD M. NORTON, JR., Assistant U.S. Attorney, who is known to me, appeared before me, a Notary Public for the State of Maryland, City of Baltimore, and made oath in due form of law that the facts contained herein are true to the best of his knowledge, information, and belief.

SUBSCRIBED AND SWORN TO BEFORE ME,

/s/ Mrs. Geraldine Zinser
MRS. GERALDINE ZINSER
Notary Public

My Commission Expires 7/1/82

[C.A. App. 66-72]

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